BRIEF OF RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 158

MILDA HOPKINS ASHDOWN,
Petitioner,

vs.

STATE OF UTAH,
Respondent.

ON CERTIORARI TO SUPREME COURT
OF THE STATE OF UTAH

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QUESTIONS PRESENTED

1. Was petitioner's oral confession obtained in violation of petitioner's constitutional guaranties as embodied in the Fourteenth Amendment to the Constitution of the United States of America?

2. Was petitioner's oral confession admitted by the Trial Court in violation of the due process of law

guaranteed by the Fourteenth Amendment to the Constitution of the United States of America?

3. Was Instruction No. 6 as given by the Trial Court a violation of due process of law, *the Court having heard witnesses in the absence of the jury for purposes of determining the voluntariness of the confession*, where four of the witnesses who gave evidence to the Court were not thereafter called to testify before the jury?

STATEMENT OF THE CASE

This is on certiorari by Milda Hopkins Ashdown to a decision of the Supreme Court of Utah affirming a verdict of murder in the first degree returned by a jury of her peers who recommended life imprisonment as punishment and not the death sentence.

Milda Hopkins Ashdown, at Cedar City, Iron County, Utah, on the 5th day of July A. D., 1955, murdered her husband, Ray Ashdown, by administering to him strychnine poison. Ray Ashdown was alive on the morning of July 5, 1955, and was seen in the yard of his home by a witness (R. 4-6). On the morning of the same day, Milda Hopkins Ashdown went to the home of two neighbors using their telephones to summon medical aid for her husband (R. 6-16); she told one neighbor that her husband seemed to be in a lot of pain and was going paralyzed from his waist down. *That her husband had not felt well since his breakfast* (R. 14, 15). A physician responded to the calls for aid and attended the husband, observed his death, later performed an autopsy and obtained specimens for analysis (R. 17-49). The physician

had a conversation with Ray Ashdown and testified thereto as follows:

"Q. Did you have a conversation with either Mrs. Ashdown or Ray at that time?

"A. Yes, I did. I directed most of my conversation to Ray, because he looked like he was going to die within a few minutes.

"Q. Will you state the substance of that conversation as you best recall it?

"A. I went up to the couch, and I said: 'Ray, what have you taken? Have you taken any poison? Have you eaten anything spoiled?' Because he looked like he had ingested some toxin of some kind. He was in a generalized state of convulsion. It was very difficult for him to talk. And I administered a sedative to him hypodermically, in the vein, to relax him for just a minute or two so he could speak. And I said: 'Ray, have you taken anything poison?' And he said 'No.' I said: 'Have you eaten anything spoiled?' He said 'No.' I said: *'Were you well this morning when you got up?' He said: 'Yes.' I said: 'When did you get sick?' And he said: 'A little while ago.'* I said: 'Hav-n't you drunk anything or eaten anything?' He said: 'I had some lemonade about half hour ago.'

"Q. Do you recall, doctor, whether he used the word lemonade or lemon juice?

"A. He used lemon juice. He said: 'I had some lemon juice about a half hour ago.' And I said: 'How did it taste, Ray?' And he started into another convulsion, and he said, 'Doc it tasted bitter.' Then he rolled his eyes back and threw his head back and went into a generalized convulsive seizure and died" * * * (R. 18, 19).

Milda Hopkins Ashdown told the physician that she had given her husband salt water.

"Q. Now, I will ask you, doctor, you talked to Milda when you arrived at the Ashdown home, is that correct? That is the defendant?

"A. Yes.

"Q. I will ask you, doctor, did she tell you that she had given him salt water?

"A. Yes, she told me that she had given him two or three glasses of salt water.

"Q. Salt water.

"A. I remember.

"Q. Assuming a person had strychnine and had taken it, what effect does salt water have?

"A. Makes them die quicker.

"Q. Die quicker.

"A. Yes, it hastens, it hastens the poison.

"Q. Isn't that the remedy they give for strychnine, to give you salt?

"A. I don't know. I know—

"Q. Isn't that a fact? Doesn't your medical book tell you that?

"A. No. No—

"Q. Does it not cause vomiting, salt water?

"A. In some cases a large quantity may.

"Q. Isn't that a fact, doctor?

"A. In some cases it might, a large quantity might promote vomiting.

"Q. It isn't might. It does, doesn't it?

"A. Not always. It depends on the case.

"Q. You know physicians that give it?

"A. Well, I don't know—

"Q. For poisoning?

"A. I don't give it for poisoning" * * * (R. 23).

The specimens obtained from the body of the deceased were transported to the Utah State Chemist by a deputy sheriff

(R. 29-31). The State Chemist made an analysis and found strychnine to be present (R. 31-45).

The county sheriff visited the Ashdown home on the morning of July 5th and examined the premises (R. 50-52). The sheriff testified, in part:

> "Q. Did you observe the dishes in the kitchen, Mr. Nelson?
>
> "A. Yes, we did. They were piled up a pile say this high, on the top there was an aluminum coffee cup on the top with a red ring around the top of it that was setting on the top of the rest of the dishes turned upside down.
>
> "Q. Tell us whether or not the dishes had been washed, Mr. Nelson.
>
> "A. I didn't think they had.
>
> "Q. In relation to this cup you spoke about, had it been washed?
>
> "A. Yes, the cup was clean" * * * (R. 52).

The sheriff, his deputy and the county attorney returned to the Ashdown residence on the afternoon of the 5th of July. They talked with Milda Hopkins Ashdown (R. 52, 53).

> "Q. Will you tell us if you can who spoke and what was said, as nearly as you can remember?
>
> "A. As near as I remmber, I started the conversation. I think I said to Mrs. Ashdown that we would like to talk to her a little about the case, and I asked her if she knew really what happened. She said no she didn't know what had happened. I said to her, 'Well, Mrs. Ashdown, Dr. Williams seems to think that Ray has been poisoned or had some poison.' 'Well,' she says 'I didn't do it. I wouldn't even poison a rat'" * * * (R. 53).

Thereupon the trial judge admonished the jury and recessed the Court (R. 53).

The Court re-convened and thereafter *in the absence of the jury* the Trial Judge heard the continued testimony of the sheriff, testimony of the deputy sheriff, witness for the *defense*, John Walter Segler, the accused's uncle, the *defendant*, Milda Hopkins Ashdown, witness for the *defense*, William Henry Hopkins, the accused's father (R. 53-87). Counsel for the accused made his objection to the admission of oral and written statements of the accused as testified to by the sheriff *in the absence of the jury* (R. 87, 88). The Court took the matter under advisement and recessed until the following day (R. 88). Upon reconvening and *still in the absence of the jury* the Court heard further testimony of the deputy sheriff (R. 89-104). *The Court then upon its own motion called Patrick Linton, the prosecutor, as a witness not in the presence of the jury* (R. 105-109). At the conclusion of the prosecutor's testimony to the Court the following colloquy between Court and counsel is recorded:

> "The Court: Just a moment. Do you request the right to question this witness anything further on that transaction?
>
> "Mr. Erickson: No.
>
> "The Court: By what I said previously I do not mean to rule that you could not question him.
>
> "Mr. Erickson: No, I don't intend to call him and I will not before the jury, but I only want to be certain of this record which the court will pass on.
>
> "The Court: You would perhaps have the right to call him before the jury. If you call him you perhaps ought not to argue that he would be disqualified.
>
> "Mr. Erickson: I wouldn't. The only thing is the preservation of the record in case of a conviction

"The Court: The court doesn't mean to intimate that you are not a liberty to call him as a witness, if you desire to call him.

"Mr. Erickson: Your Honor, I will not call him, just as long as I have this record which your Honor has to pass on" * * * (R. 109).

From the evidence adduced through the witnesses in the absence of the jury, the Trial Court found:

"Regarding the question of whether the prosecution can go into the evidence which has been testified to by the Sheriff Arthur Nelson and by Deputy Wells and Mr. Fenton, the court wishes to make the following statement of its findings:

"First, that there was no promise made or assurance given of any immunity from prosecution.

"Second, the court finds that the defendant was advised before the statements that are sought to be introduced in evidence were made: that she had the right to refuse to answer questions or make a statement and that she had the right to have an attorney.

"Third, that the defendant did not at that time ask for an attorney, nor until after the statements offered were made, except as to certain statements made in answer to questions as to where she procured the strychnine, which questions were asked and answers made after she indicated that she should have or desired to have an attorney.

"Fourth, that the defendant was questioned or interviewed by Sheriff Nelson and Deputy Wells and the District Attorney from approximately 4:00 p. m. until approximately 8:30 p. m. before she made the statements that are under question here; that she was then in the courtroom in the presence of those three officers, two peace officers and the District Attorney, and that her sister, although she came with her to the sheriff's office, wasn't permitted to go into the room.

nor was her father or her uncle permitted to go into the courtroom during the course of that questioning.

"The court finds that there were no threats of violence or other threats made by either of the officers or by the District Attorney.

"Sixth, that there was no promise made nor any assurance given of any benefit or reward, except that the District Attorney informed the defendant that if poison had been given by mistake it might make a difference between a prosecution for murder and manslaughter, and the District Attorney read to the defendant the statute relating to first degree murder and involuntary manslaughter, and informed the defendant of the penalties for those respective offenses.

"The court believes that neither the method of questioning of the defendant under the circumstances shown by the evidence, nor the physical or mental distress suffered by the defendant under the circumstances shown by the evidence were severe enough to amount to compulsion as that is contemplated by the constitutional provisions or statutes which provide that a person shall not be compelled to give evidence against himself.

"The court believes that the circumstances were not such as to induce the defendant to make the statement in question herein, that is such serious statements as the statement that she had furnished or given strychnine to her husband.

"The court believes that the inducing cause of the statement was not fear nor duress, nor compulsion, nor any promise or assurance of any reward or immunity. *The court concludes that the statements made by the defendant to the officers after she stated that she desired or should have counsel are not admissible; that any inquiry as to those statements should not be made in the presence of the jury.* (Emphasis ours.)

> "The court believes that the statements made to the officers prior to that time are admissible, but the court proposes to give to the jury an appropriate instruction as to its consideration of the weight and credibility of such statements. Counsel may proceed accordingly" * * * (R. 110-112).

Thereafter trial resumed with all jurors present and the prosecution called the sheriff and the deputy sheriff to testify. They were examined and cross-examined (R. 113-136). The State rests. The defense rests (R. 136). The defense *did not call upon* the accused, her uncle, her father or the State's prosecutor *to testify before the jury*. These *four* available witnesses had testified to the Court in the absence of the jury.

SUMMARY OF ARGUMENT.

It is the contention of the State of Utah that there was no promise made or assurance given the defendant of any immunity from prosecution; that the defendant was fully and timely advised of her constitutional rights; that the defendant was not threatened with violence or otherwise; that defendant was not promised or assured of any benefit or reward; and, that neither the method of questioning nor the physical or mental distress suffered by the defendant were, under the circumstances shown by the evidence, severe enough to constitute the abridgment of any constitutional guarantee of due process of law.

The State of Utah holds that the oral confession of the defendant was voluntary and not secured by force, duress, fraud or coercion, or in any manner not consistent with due process of law.

The Fifth Amendment to the Constitution of the United States of America forbids the abridgment only by Act of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed and does not apply to acts of the individual states. The Supreme Court of the State of Utah is the proper tribunal to resolve the issues as to the due process guaranties of the Constitution of the State of Utah, and we are here concerned only with the Fourteenth Amendment to the Constitution of the United States of America and the guaranties of due process of law therein declared.

Finally, the State of Utah contends that on the trial of a criminal case in a state court, the introduction in evidence of a free and voluntary confession made while uncounseled does not create an infirmity under the Fourteenth Amendment such as empowers a United States Court to set aside a conviction.

ARGUMENT

I

PETITIONER'S ORAL CONFESSION WAS NOT OBTAINED IN A MANNER VIOLATIVE OF PROCEDURAL DUE PROCESS OF LAW.

The due process guaranties for which we are here concerned are those afforded petitioner under the Fourteenth Amendment of the Constitution of the United States. Due process of law is secured against invasion by the Federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. *Betts* v.

Brady (1942), 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252. It has been held since the early days of our constitutional history that the first ten amendments, or more accurately put, the first eight amendments, forbid the abridgment only by act of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to acts of the states. 11 Am. Jur., Constitutional Law, Sec. 310, pp. 310, 311; *In re Sawyer*, 124 U. S. 200, 219, 8 S. Ct. 482, 492, 31 L. Ed. 402, 408. The cause here, springing as it does from a state court, invokes in this Honorable Tribunal the constitutional guaranties of the Fourteenth Amendment and of the Fifth Amendment only insofar as the right to refrain from giving self incriminating testimony is embodied in the Fourteenth.

Petitioner contends her trial was not fair and impartial because:

"(a) She was a person of limited education;

"(b) She was questioned directly after the funeral and burial of her husband;

"(c) The weather was extremely hot;

"(d) Members of her family were not permitted to be with her at the time of her interrogation;

"(e) She did not have counsel during the interrogation, although she requested counsel;

"(f) She was in a hysterical and emotional condition during the questioning;

"(g) She was questioned for a period of five and one-half hours without food or rest;

"(h) Her confession was not voluntary and inducements were made;

"(i) She was asked the same questions over and over;

"(j) At the beginning of the questioning before petitioner had been charged with any crime or advised of her constitutional rights, the District Attorney read the statutes relating to manslaughter and murder to petitioner as though petitioner was guilty of one or the other charge."

The Court below very carefully considers the foregoing contentions of petitioner and in its opinion holds that the confession was voluntary within the meaning of constitutional provisions against self incrimination and properly admissible in evidence. Mere *excerpts* from the record cannot suffice to apprise this Honorable Court of the facts upon which the Court below relied to sustain the findings of the trial judge that:

"First: There was no promise made or assurance given the defendant of any immunity from prosecution.

"Second: The defendant was advised of her constitutional rights.

"Third: There were no threats of violence or other threats, no promise or assurance given of any benefit or reward; and

"Fourth: Neither the method of questioning nor the physical or mental distress suffered by the defendant were, under the circumstances shown by the evidence, severe enough to constitute the abridgment of any constitutional guarantee of due process of law."

Whether a confession is "voluntary" and as such admissible, or "coerced" and thus wanting in due process, is not a matter of mathematical determination. *Haley* v. *State*, 332 U. S. 596, 97 L. Ed. 224. Absent a mental infirmity the "limited education" claimed for your petitioner did not make

her oral confession not voluntary. Your petitioner had been interrogated *prior* to the funeral and if the officers had reasonably suspected her part in the crime they would have deserved severe criticism had they not further questioned her immediately upon confirmation of their suspicions. The State Chemist completed his analysis and report on the late afternoon of July 8, 1955, and made delivery thereof at his office in the State Capitol (R. 36). The report confirmed the suspicion of the officers that the deceased was poisoned. The questioning of your petitioner, here complained of, occurred on July 9, 1955 (R. 54). July days in Utah are ordinarily "extremely hot." This we have to say for (a), (b) and (c) of your petitioner's argument as to the voluntariness of her confession.

Petitioner next complains that members of her family were not permitted to be in the room with her during her interrogation, *although her father and uncle requested it.* It is understandable that the sheriff would desire to prevent persons from coming in and out of the Courtroom where the questioning took place (R. 56); and, there was nothing wrong with the sheriff's request of Mrs. Ashdown that he talk to her alone (R. 102). Now, did the father and uncle actually request or demand to be with your petitioner during the interrogation, and, if they did, why were they not called to make such an assertion to the jury? A careful reading of the testimony of the uncle does not so indicate (R. 77-83). The witness said:

> "* * * we didn't try to get in anymore than I says 'I don't think that they had a right to take her in and question her, without her father's presence or an attorney.' I told them that several times." * * *

The record shows that the father of your petitioner at no time requested to enter the interrogation room (R. 84-86).

In *Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (February 9, 1953), this Honorable Court says:

> "* * * Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. *McNabb* v. *United States*, 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608; *Upshaw* v. *United States*, 335 U. S. 410, 93 L. Ed. 100, 69 S. Ct. 170. Cf. *Allen* v. *United States*, No. 11,132, 91 App. D. C. 197, 202 F. 2d 329, decided July 18, 1952. This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. The Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the states. *Gallegos* v. *Nebraska*, 342 U. S. 55, 63-65, 96 L. Ed. 86, 93, 94, 72 S. Ct. 141. Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained." * * *

Petitioner complains for lack of counsel during her examination *although she requested it* and her father and uncle requested it. There is no conflict in the evidence to the fact that petitioner did not request counsel until after she had confessed that she put the strychnine in the cup (R. 59). The State of Utah readily concedes that your petitioner's father and uncle did at various time suggest that she should have an attorney. There is nothing in the record to suggest that either the father or the uncle were not at

liberty to provide the petitioner with counsel at any time. Of this the record speaks:

"Q. * * * Now, Mr. Hopkins, were you at the courthouse after the funeral of Ray Ashdown?

"A. I was, yes, sir.

"Q. Would you tell the court what time you arrived there after the funeral? Just tell him what took place there in your own language, will you?

"A. I remember, if my memory serves me rightly, I appeared there between four and five o'clock and went immediately into the sheriff's office; and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description.

"Q. What was the answer to that?

"A. Well, if I remember right, I believe Mr. Benson related that she was under suspicion. And if I remember right I believe I told him that we was very sorry, that we had no—that was the first information I had to that effect that she was even under suspicion, and he informed me that she was under suspicion.

"Q. Did you ask for counsel then?

"A. Yes. I said 'I believe that she should have an attorney in there.' And I made the remark that I intended to employ you as an attorney. There was considerable confusion around there, back and forth and so forth,—

"Q. Well now,—

"A. As I remember right, those are the words I said.

"Q. How long did you remain, Mr. Hopkins, in the courtroom?

"A. Well, we were there off and on from about 5:00—I would say 4:30 to 5:00 o'clock, until appropimately 9:00 o'clock.

"Q. Nine o'clock.

"A. And there was at intervals I was not in the sheriff's office, we accompanied Mr. Benson up to the house, Walter Segler and myself, and Mrs.—the Welfare lady, we accompanied them, and Mr. Benson up there on two different trips during that interval, at that time.

"Mr. Erickson: I think that is all, Mr. Hopkins."

Cross-examination.

By Mr. Fenton:

"Q. Mr. Hopkins, actually your statement made in reference to employing Mr. Erickson was made that evening after you had talked to your daughter, and not before, is that not correct?

"A. Well, now, I wouldn't be certain as to just when that remark was made, but it was made some time during that afternoon.

"Q. As a matter of fact, Mr. Hopkins, that remark was made in the presence of Sheriff Nelson, Mr. Wells, myself, after you had visited your daughter in the courtroom, is that not true?

"A. Well, that may be the case. I wouldn't say that it wasn't" * * * (R. 85, 86).

On the trial of a criminal case in a state court the introduction in evidence of a free and voluntary confession made while uncounseled does not create an infirmity under the Fourteenth Amendment which empowers a United States Court to set aside a conviction. *State* v. *Sullivan*, 10th Cir.,

227 F. 2d 511. This Honorable Court has held and affirmed that state courts are not bound to exclude a confession because, without coercion, it was obtained while a prisoner was uncounseled. *Strobel* v. *California*, 343 U. S. 181, 197, 96 L. Ed. 872, 884, 72 S. Ct. 599; *Lisenta* v. *California*, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280; *Stein* v. *People of the State of New York*, 346 U. S. 156, 187, 188, 97 L. Ed. 1522, 1544, 73 S. Ct. 1077, 1094. (June 15, 1953.)

The State of Utah further concedes that appellant was naturally emotionally upset at the time of the questioning. No one would expect her to have been calm and unexcited but there is nothing in the record to indicate that your petitioner was hysterical or that she did not understand what she was doing. The fact is that your petitioner's own testimony refutes any such contention; she knew what was transpiring during the questioning:

> "Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men? Tell the court, will you, please?
>
> "A. Well, he said 'If you will tell us what happened, why it will go a lot easier on you.' He says 'I confessed and it was a lot easier on me, if I hadn't confessed I might not gotten off, I might have been facing the firing squad now.'
>
> "Q. That statement was made where, Milda, and when?
>
> "A. Oh, it was in the courtroom there. It was quite some time after I had been in there and they had been questioning me. He said that.
>
> "Q. Do you remember who was present, Milda, when that was said?
>
> "A. I am pretty sure they all was in there.

"Q. You are pretty sure on that?
"A. Yes.
"Q. Now, you told me this story, you told me this as soon as I come over here.
"A. Yes.
"Q. This isn't the first?
"A. No.
"Q. You told me that when I talked to you?
"A. Yes.
"Q. Before the preliminary hearing?
"A. Yes" * * * (R. 84).

The evidence shows that your petitioner was questioned from 4:00 p. m. until about 9:30 p. m. and that she gave her confession within the last hour. The evidence further shows that she was not offered food during that period of time. There is no claim made here that she was threatened, hit or abused. We respectfully call this Court's attention to the case of *Gallegos* v. *Nebraska*. Gallegos was booked on a charge of vagrancy although working at the time. He was held in a Texas jail for eight days and questioned intermittently by police, sometimes kept in an 8'x8' cell. He received one meal a day. Gallegos claimed he was threatened but not hit. On the fourth day Gallegos admitted murdering his paramour in Nebraska. Apprehended September 19, 1949, Gallegos appeared before a magistrate for the first time October 13, 1949. Concurring in the affirmance of the conviction, Justices Jackson and Frankfurter said: "For 3 days Gallegos refused to tell his name. When he finally revealed his identity he went on and told all. He may have been of the impression that the authorities who were holding him knew more than they did. Only the fact that he was in custody, the fear that his deeds were known and the weight

of the crime on his conscience can be said to have coerced his confession." *Gallegos* v. *Nebraska*, 342 U. S. 55, 96 L. Ed. 86, 72 S. Ct. 141.

Your petitioner's oral confession was voluntary and no promises or inducements were made; the excerpts from the record cited by petitioner do not show otherwise. Petitioner contends inducements were made because (a) she was interrogated as to whether a mistake in administering the poison had been made; (b) criminal statutes pertaining to murder and manslaughter were explained to her; and (c) the prosecutor told her:

> "Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men?
>
> "A. Well, he said 'if you will tell us what happened why it will go a lot easier on you.' He said, 'I confessed and it was a lot easier on me, if I hadn't confessed I might not have gotten off, I might have been facing the firing squad now" (R. 84).

We make additions to your petitioner's excerpts from the record. Petitioner's Brief, page 24.

Sheriff Nelson on direct examination:

> "A. Well, then I asked Mrs. Ashdown again, I says, 'Now,' I says, 'Think and see if there has been a chance that there has been a mistake made, any kind of a mistake on that poison.' I says 'If there has been a mistake made' I says 'we should know about it and we could iron it out.' And she says, 'I don't know of any mistake.' And I says, 'Well, there is something happened and somebody should know something about it.' 'Well,' she says 'do you want me to confess to something I didn't do?' I says 'No, we don't want you to confess to anything you didn't do; don't want anyone to confess to something they didn't do.' And I think that was told to her at least twenty-five or

thirty times during the conversation in the evening. She did bring it up several times 'Do you want me to confess to something I didn't do?' She was told each time that none of us wanted her to confess to anything she didn't do.

"Q. And what is the next conversation as you remember it, sheriff?

"A. Well, I think I said to her 'Do you have any idea how that poison got in that cup?' I says 'Do you think there is any chance that Ray put it in, that Ray got hold of any poison anywhere that you know of?' And I think she said again no, that she didn't know of any. And I think I asked her about the same thing over again, that somebody must have put some poison in the cup because Ray was pronounced being poisoned. I says 'Now, tell me, how did the poison get in the cup. Do you know? Can you tell me how it got in the cup?' She says 'Ray put it in.'

"Q. Did she go into detail as to how Ray put it in?

"A. I asked her how Ray put it in. I says, 'What was the strychnine in?' She says 'It was in a small envelope.' She took her thumb and finger and held it like that. I says 'Did he pour the strychnine out of the envelope into the cup?' She said yes. I said 'What became of the envelope?' She says 'I took it in the bedroom and threw it in the bedpan. 'Well,' I says, 'Mrs. Ashdown, was there any liquid in that bedpan?' She said 'Yes.' I says 'What finally became of the bedpan?' She says 'I took it out the back and emptied it down the toilet hole.' I says 'What did Ray say at the time he took that poison?' She said 'Ray told me to get rid of all the evidence and to not tell anybody about it.' And so we didn't say anything at all, no one said a word to her for a minute or two; and finally I said, 'Mrs. Ashdown, 'I don't believe that Ray put that poison in that cup. Why don't you tell us the truth about that poison and how it got in the cup.' I says 'Tell us the truth about it so as we

can clear this thing up.' She started crying and said 'I will never see my children any more.' And I says, 'Yes, you would see your children again, Mrs. Ashdown.' I says, 'Your children will be taken care of.' I says, 'Just tell us who put the poison in the cup.' She says, 'I put it in.' I says 'How much did you put in, Mrs. Ashdown?' She says 'I put in five or six grains.' She says 'I figured on taking it myself and decided to give it to Ray' * * * (R. 58, 59).

Petitioner's Brief, page 25.

Sheriff Nelson on cross examination:

"Q. Then I ask you at the hearing, to impress it very much, at that time I will ask you did not Patrick Fenton, the district attorney, in your presence and in the presence of Mr. Welsh, says 'I killed five men while I was in the Army and it is better to confess, I got off. If I hadn't done that,' and you studied and you studied, and you said you didn't hear that statement.

"A. I still say I didn't hear that statement.

"Q. Would you tell the court that that wasn't said in that courtroom?

"A. No, but it wasn't said in my presence.

"Q. And you know it was said, don't you?

"A. No.

"Q. Don't you?

"A. I don't know for sure that it was said.

"Q. Hasn't Mr. Fenton told you he made that statement?

"A. Since the preliminary hearing.

"Q. Yes.

"A. Yes.

"Q. And you knew that?

"A. No, not at the preliminary hearing.

"Q. You know now it was said.

"A. Yes, I know there was something to that effect, now, yes.

"Q. And it would go easier on her because he did it, was that not said in that place?

"A. Not in my presence.

"Q. But it was said in that courtroom, you know.

"A. I don't know whether it was or not.

"Q. Have you talked to anyone since I quizzed you on that?

"A. It wasn't said in my presence.

"Q. But you know it was said.

"A. I don't know it was said, either.

"Q. Hasn't somebody talked to you about it?

"A. No, they haven't talked to me.

"Q. Hasn't that been mentioned, sheriff?

"A. Yes, it has been mentioned, but it has never been mentioned if she made any promises it might go easier on her, that was never mentioned to me.

"Q. That was never mentioned to you?

"A. No.

"Q. But you hesitated for fifteen or twenty minutes, I tried to pull that out of you, but you said you couldn't remember.

"A. I couldn't. That is why I hesitated.

"Q. But you wouldn't say it wasn't said in your presence, you said you couldn't remember, didn't you sheriff?

"A. It wasn't said in my presence.

"Q. Well, but you said you don't remember, it might have been said but you don't remember.

"A. I don't remember.

"Q. Is that right?

"A. No, I don't remember hearing it * * * (R. 70, 71).

Petitioner's Brief, page 26.

Sheriff Wells on further direct examination:

"A. Mr. Fenton made the statement as I recall being in quite a predicament at one time his self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly had saved him from the firing squad.

"Q. Where, with relation to this conversation you have told us about did this particular conversation come in?

"A. This was after, as I recall it, this was after she had been advised that her husband's death was caused by strychnine poisoning, and the statute of first degree murder and manslaughter was read to her. I think that statement that you made, Mr. Fenton, then was following.

"Q. Mr. Wells, was the statement made in connection with questioning about the possibility of an accident, or was it made in connection with questioning about an intentional act?

"A. That was an accident, as I understood it.

"Q. At the time the investigation was going into the possibility of an accident?

"A. That is right.

"Mr. Fenton: Now, your Honor, is there any other item the court would like gone into by Mr. Wells at this time? I believe there is one other question I should ask, your Honor.

"Q. Mr. Wells, in relation to the 9th day of July or any other time, do you know of any promises or offers that were made to Mrs. Ashdown that if she would tell what happened she would not be prosecuted?

"A. Not in my presence, no, sir * * * (R. 94, 95).

Petitioner's Brief, page 27.

Patrick H. Fenton, on examination by the Court:

"Q. Mr. Fenton, there has been some testimony that you on the—was it the 10th of July that that questioning occurred in the courtroom?

"A. No, sir, on the 9th of July.

"Q. The 9th of July. Referring to the testimony of the sheriff and Deputy Wells, regarding conversations with the defendant in the courtroom at the City & County Building in the afternoon or evening of the 9th of July, there was some statement made relative to the defendant being advised that it would be better for her if she told what had happened. Was any statement like that made by you or the sheriff or Deputy Wells, to Milda Ashdown?

"A. No, your Honor.

"Q. Did you tell her 'If you will tell us what happened why it will go a lot easier on you,' in substance or effect?

"A. No, your Honor.

"Q. Did either the sheriff or Deputy Wells make any statement to that effect to Milda Ashdown?

"A. No, your Honor, not in my presence.

"Q. Now, what was said regarding some circumstance of your having been involved in some investigation and that you had avoided proceedings by telling what had happened? Was there anything said on that subject by you to Milda Ashdown that day?

"A. Yes, your Honor.

"Q. Will you tell us what it was, as accurately as you can.

"A. Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the glass of lemon juice thinking it was salt. And at one point during that phase of the conversation I told Mrs. Ashdown that at one time

in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and, in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officers what had happened. That is the conversation as nearly as I can remember it, your Honor.

"Q. Now, in relation to this matter of reading the statutes as testified to by Deputy Wells, will you state what was said preliminary to the reading of those statutes?

"A. Yes, your Honor. It was in line with the same phase of questioning concerning possibility of an accident; and I either got the statute or asked one of the officers to get it, I am not sure which, it was brought in at my request or else I went and got it, and it was explained to Mrs. Ashdown—

"Q. Just a moment—

"A. All right. Or told Mrs. Ashdown—

"Q. Say who said what.

"Q. Yes. I told Mrs. Ashdown that as I saw the matter there was a possibility of either first degree murder or involuntary manslaughter, if she had done it, and that the penalty for involuntary manslaughter was up to one year in the county jail; and that the penalty for first degree murder was, with a recommendation of leniency from the jury, either death or life imprisonment and without that recommendation a mandatory death penalty and then I read the statutes covering those particular subjects. The only conversation was first degree murder and involuntary manslaughter; there was nothing said about second degree murder or voluntary manslaughter * * * (R. 105-107).

Petitioner's Brief, page 28.

Sheriff Nelson on direct examination:

"A. I told Mrs. Ashdown, I says, 'Is there any chance, possible chance, that there has been a mistake

made, accidentally or any other way?' And I says, 'If there has, I wish we knew about it.' And she said she didn't know of any. Well, I says, 'Someone must know something about it.' She says, 'What do you want me to do, confess to something I didn't do?' I says 'Absolutely not, we don't want anyone to confess to something they didn't do.' I says, 'That is the last thing we want you to do, confess to anything you didn't do.'

"Q. Did any of the other parties in the room have a conversation with Mrs. Ashdown in your presence?

"A. Yes, Mr. Wells, the deputy sheriff, Wells, he talked some to Mrs. Ashdown. And I remember you, Mr. Fenton, talked to her.

"Q. Do you remember any of the conversation between myself and Mrs. Ashdown?

"A. Well, not clear enough that I would be able to repeat it. It is quite a job to remember all you say yourself in these cases.

"Q. All right, sheriff, what is the next conversation that you remember?

"A. I believe I asked Mrs. Ashdown if Ray ever got despondent and she said yes, he did, several times. I says, 'In what way?' And she says, 'Well, he has told me several times that he wished he was dead.' And then she went on for some time telling us about some of the family affairs, which she did right on the start too.

"Q. And do you remember any further conversation, sheriff?

"A. Well, I remember still asking Mrs. Ashdown if there is any possible chance that Ray could have got hold of any poison. She says not that she knew of. And later on I asked her just about the same question. And I says, 'Someone had to—someone had to put the poison in that lemon juice, it is pronounced poison.' I says, 'How did it get in there? Can you tell me how it got in, or who put it in?' She says 'Ray put it in.'

"Q. Will you tell us as nearly as you can remember, sheriff, her words at that time?

"A. I says—oh, I says, 'What kind of a container was the poison in?' She said it was in a small envelope. And I said 'Did Ray put it in himself?' And she said 'Yes.' I says, 'What did Ray say to you at that time?' She said 'Ray told me not to tell anyone'—

"Mr. Erickson: I object to that as incompetent, irrelevant and immaterial, as a deceased person, 'Ray told me'—

"The Court: The objection is overruled.

"A. She said 'Ray told me to destroy all the evidence and not to tell anyone.'

"Mr. Erickson: Your Honor, I make the same objection, what Ray told her, a deceased person who is dead.

"The Court: The objection is overruled. The answer may stand.

"Mr. Erickson: Exception.

"Q. Who next spoke and what was said, sheriff?

"A. I spoke to her next. We didn't say anything for a few minutes, only looked at each other. Finally I said to Mrs. Ashdown, I said, 'Mrs. Ashdown, I don't believe that Ray put that poison in that juice,' I said, 'Why don't you tell us the truth about that poison and who put it in?' She says 'I'll never see my children any more.' 'Yes,' I says 'You'll see your children again, that will be taken care of.' I says, 'Who put the poison in?' She says 'I did.'

"Mr. Erickson: Now, just a minute, I move to strike that from the record under the court's own ruling, going back to his testimony there, that is improper. That was the last question we solved before your Honor, was that very thing.

"The Court: The objection is overruled.

"Mr. Erickson: May I ask him one question, your Honor?

"The Court: Yes."

By Mr. Erickson:

"Q. Was this before she asked for counsel?

"A. Yes, that was before she asked for counsel?

"Q. All right, you are sure of that sheriff?

"A. Yes, sir * * * (R. 117-119).

"A. I asked Mrs. Ashdown about the container, what she had did with the container, when she had placed the container on top of the Frigidaire; then I asked her why that she had came in the house with Dr. Williams, went out into the kitchen, washed and rinsed the cup that the lemon juice was mixed in, and laid the cup on top of the dishes that were in the draining board.

"Q. What was Mrs. Ashdown's answer?

"A. There was no answer.

"Q. Did you ask that question once or more than once?

"A. I asked that question ten or fifteen times.

"Q. Was it answered for you at any time?

"A. No, sir.

"Q. Who spoke next and what was said?

"A. Mr. Nelson, I believe, questioned Mrs. Ashdown, I think at that time he asked Mrs. Ashdown about the contents of the cup, the lemon juice, and if she knew at that time how that this strychnine was put in the cup.

"Q. And who next spoke, and what was said?

"A. Mrs. Ashdown at that time made the statement that her husband Ray had poured the strychnine

in the lemon juice and had asked her to destroy the envelope that the strychnine was in and not to tell anyone about it.

"Q. Who next spoke, and what was said, Mr. Wells?

"A. Mr. Nelson at that time asked Mrs. Ashdown, he told Mrs. Ashdown that he didn't believe that that was the truth, that he didn't think that Ray had mixed the strychnine in the lemon juice; therefore, he asked Mrs. Ashdown to tell him the truth about who put the strychnine in the lemon juice, and Mrs. Ashdown answered him, 'I did'." * * * (R. 127).

Studied in context, the excerpts of your petitioner's report of the testimony show that no promise or inducement was put forth by the inquiring state officials.

As to petitioner's point (i) the State of Utah admits that the accused was asked some of the same questions "over and over".

Petitioner finally contends:

"(j) At the beginning of the questioning before petitioner had been charged with any crime *or advised of her constitutional rights*, the District Attorney read the statutes relating to manslaughter and murder to petitioner as though petitioner was guilty of one or the other charge." (Emphasis added.)

The record speaks otherwise:

"Q. Mr. Wells, I call your attention to the 9th day of July 1955, were you present at a meeting in the City & County Building in Cedar City, Utah where Mrs. Ashdown was present?

"A. Yes, sir.

"Q. To the best of your recollection what time did that meeting commence?

"A. Around 4:00 p. m., the afternoon, Saturday, the 9th.

"Q. Will you tell who was present, please?

"A. Mr. Patrick Fenton, District Attorney, Sheriff Arthur Nelson, and myself.

"Q. Mr. Wells, will you tell us as nearly as you can remember the conversation that took place that afternoon?

"A. When we first entered the courtroom with Mrs. Ashdown, Mr. Nelson asked the question of whether or not that she remembered anything that could be of any assistance to the officers.

"Q. Had Mrs. Ashdown been told that her husband had died of strychnine?

"A. At that time, yes.

"Q. Go ahead, please.

"A. Mrs. Ashdown immediately answered Mr. Nelson that she didn't know of anything that could be of any help and immediately told Mr. Nelson that Mr. Ashdown had been despondent on several occasions.

"Q. And after Mrs. Ashdown made those statements what next was said?

"A. Mr. Patrick Fenton advised her of her constitutional rights, and also at that time told her the difference between first degree murder and manslaughter, and even read the state statutes to her" * * * (R. 89, 90).

And,

"Q. Mr. Wells, you stated to the court that Patrick Fenton read the statutes to her, is that right?

"A. That is true, yes, sir.

"Q. Now, would you tell me, was that read aloud to her?

"A. Yes, sir.

"Q. What did the statute say?

"A. It was defining the difference between first degree murder and manslaughter.

"Q. Manslaughter?

"A. Yes, sir.

"Q. Now, was the constitution read to her?

"A. The Constitution?

"Q. Her rights?

"A. She had been advised of those rights before hand; Mr. Erickson" * * * (R. 97, 98).

To the first issue here presented:

"Was petitioner's oral confession obtained in violation of petitioner's constitutional guaranties as embodied in the Fourteenth Amendment to the Constitution of the United States of America?"

the State of Utah respectfully contends that the answer is *no*.

II

THE ADMISSION IN EVIDENCE OF THE ORAL CONFESSION WAS IN NOWISE VIOLATIVE OF DUE PROCESS OF LAW.

The established rule in Utah is that the duty of determining whether an admission or confession of a defendant was voluntary rests with the trial court. *State* v. *Crank*, 105 Utah 332, 142 P. 2d 178, 170 A. L. R. 542; *State* v. *Braasch*, 119 Utah 450, 229 P. 2d 289. The Fourteenth Amendment

leaves the states free to allocate functions as between the judge and jury as they see fit. In *Stein* v. *New York*, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, this court wrote:

> "The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit. * * * Many states emulate the New York practice, while others hold that presence of the jury during preliminary hearing is not error. Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom."

Federal courts have long regarded it as proper for a Court, in passing on the voluntariness of a confession for the purpose of determining its competency, to hear evidence on that question in the absence of the jury. *Hale* v. *United States* (1928; C. C. A. 5th), 25 F. 2d 430; *Ramsey* v. *United States* (1929; C. C. A. 8th), 33 F. 2d 699; *McNabb* v. *United States* (1941; C. C. A. 6th), 123 F. 2d 848.

Your petitioner approaches this question under the assumption that the confession was *involuntary*; the State of Utah contends that the confession was *voluntary*. That is the exact issue this court is called upon to determine under the first of the questions here presented. The State of Utah never has claimed and does not now claim that use of a coerced confession is permissible in any court of the land—not excluding the courts of Utah. We endorse the authorities cited by your petitioner for the proposition that the Constitution of the United States stands as a bar against the conviction of any person in an American court by means of a coerced confession.

III

THE COURT'S INSTRUCTION NO. 6 WAS CORRECT IN ALLOWING THE JURY TO WEIGH THE CIRCUMSTANCES SURROUNDING THE GIVING OF THE CONFESSION AND DETERMINING NOT THE ADMISSIBILITY OF THE CONFESSION BUT RATHER THE CREDIBILITY OF THE CONFESSION AS EVIDENCE.

The instruction complained of:

> "In this case there has been testimony that on two occasions the defendant was questioned or interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to such alleged statements, you are instructed to consider carefully all the surrounding circumstances including the events of the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendants, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear or hysteria on the part of the defendant during the time. After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made."

Your petitioner complains of the instruction as follows:

> "The jury in the instant case then did not have before it all of the evidence on the question of whether the confession was voluntary and the circumstances surrounding its being made, because the testimony of Patrick H. Fenton, the district attorney, John Walter Segler, Milda Hopkins Ashdown and William Henry Hopkins was not submitted to the jury. This testimony was given in the absence of the jury and before the court only. The jury did not hear the testimony of Patrick H. Fenton as to the statement made by him to defendant that he had killed five men in Europe and confessed, they did not hear the testimony of John Walter Segler, an uncle of the accused, who testified that he protested the 'railroading' of that girl, and requested that she be given an attorney and that he was kept out of the room in which she was being questioned and told she had an attorney, or of her father, William Henry Hopkins who testified to the same thing, and the testimony of Milda Hopkins Ashdown herself, who testified that Pat Fenton, the district attorney, had told her he killed five men while in the Service and confessed or might have faced a firing squad and that it would be better for her to confess.
>
> "It was the duty of the court to recall all of these witnesses and submit all of this evidence to the jury before instructing them to pass upon and determine the weight and credibility to be given the admissions of petitioner.
>
> "Such exclusion of testimony from the jury denied petitioner a fair trial and due process of law."

Your petitioner raises this issue in this court for the *first* time. The Utah Supreme Court was not called upon to adjudicate any such question.

It is of moment to note that of the witnesses not called to testify before the jury the father and uncle were *defense* witnesses who had been *called by the defense* to testify to the court; that counsel for the defense elected not to call Patrick Fenton, the State's prosecutor (R. 109) and, finally, Milda Hopkins Ashdown, the defendant, did not elect at the trial to testify on her own behalf. We are of the considered opinion: First, that this issue should not be resolved in this Court without the State Court first having considered and passed upon it. *Musser* v. *State* (Utah), 333 U. S. 95, 68 S. Ct. 397, 398, 92 L. Ed. 562. Second, that this final contention of defendant is without merit and the result of defendant's own election.

CONCLUSION

The decision of the Supreme Court of the State of Utah should be affirmed.

Respectfully submitted,

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